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No. 08-1410

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

v.

NEW YORK STATE DIVISION OF YOUTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE NEW YORK STATE RESPONDENTS

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREA OSER
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway
New York, New York 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for the New York State Respondents

225578

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the dismissal of petitioner's claim under § 1 of the Sherman Act, where petitioner effectively conceded it was required to identify a relevant market in which any anticompetitive effects could be assessed, but failed to do so?

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COUNTER STATEMENT OF FACTS

1. Respondent New York State Office of Children and Family Services ("OCFS") is a state agency that supervises foster care, regulated child care, adoption services, and other New York programs for the welfare and safety of children. N.Y. State Office of Children & Family Servs., *About the New York State Office of Children and Family Services (OCFS)*, *available at* http://www.ocfs.state.ny.us/main/about (last visited Oct. 1, 2009).

This case centers on OCFS's regulatory oversight of "voluntary authorized agencies" – also called "private foster agencies" or "PFAs" – which are private entities that care for or arrange for the care of children or placement of children in foster care. *See* N.Y. Soc. Serv. Law § 371(10)(a); 18 N.Y. Comp. Codes R. & Regs. ("N.Y.C.R.R.") § 441.2(b). PFAs in New York operate subject to "the approval, visitation, inspection and supervision of [OCFS] as to any and all acts in relation to the welfare of children." N.Y. Soc. Serv. Law § 371(10)(a). OCFS approves PFAs' certificates of incorporation and issues operating certificates for any child residential facilities they are permitted to run. *See id.* §§ 371(16), (17); 460-a–c; 18 N.Y.C.R.R. § 441.2(f)-(I); pts. 442, 447, 448.

New York Social Services Law § 462(1)(a) authorizes OCFS to "promulgate regulations concerning standards of care and treatment . . . which shall apply to all facilities exercising care or custody of children." Those standards must "establish as a priority" that facility personnel receive training in, among other things, "safety and

security procedures" and "techniques of group and child management, including crisis intervention." *Id.* § 462(1)(c)(I).

Pursuant to § 462, OCFS has promulgated a regulation governing PFAs' use of "restraints" – defined as "containment of acute physical behavior by physical, mechanical, or pharmacological intervention, or room isolation." 18 N.Y.C.R.R. § 441.17(a)(1). The regulation requires that, before using any method of restraint, a PFA must submit a detailed restraint policy for written approval by OCFS. *Id.* § 441.17(c)-(d). That approval lasts for two years, and a PFA may not change its restraint policy in the interim without further approval by OCFS. *Id.* A qualifying restraint policy must describe, among other things, (1) preventive methods for avoiding situations that may lead to use of restraints; (2) alternatives to use of restraints; (3) the circumstances when use of restraints may be necessary; (4) methods of and rules for applying restraints; and (5) the training that staff will receive in the use of restraints. *Id.* § 441.17(d)(1). The regulation mandates that PFA staff must receive at least six hours of initial training in the above elements of the restraint policy and complete a review of the training every six months. *Id.* § 441.17(h).

2. Petitioner Handle With Care Behavior Management System ("HWC") "provid[es] crisis intervention services" nationally and internationally to mental health and social services agencies, child and adult residences, schools, juvenile justice facilities, law enforcement agencies, adult correctional facilities, and event and concert organizers (2d Cir. Joint Appendix ["J.A."] 26, 235). Its services include providing training in the use of restraints (*see* J.A. 29-30).

In this lawsuit, HWC alleges that OCFS will not allow PFAs to use HWC to develop restraint policies and provide staff training. HWC contends that OCFS has permitted PFAs to use only the restraint policy of a single vendor – a policy called "Therapeutic Crisis Intervention" or "TCI" that was developed by respondent Cornell University with state and federal grants (J.A. 39-40). The complaint alleges that the State of New York pays for the training services that Cornell provides to PFAs, and that "TCI is currently charging New York State 4-10 times the rate that it charges for identical services provided to out-of-state customers" (J.A. 31-32, 40).[1] HWC asserts that the State tolerates the higher charges because it recoups most of the cost through federal grants and matching funds (J.A. 31-32, 40; *see also* Pet. at 8).

The complaint asserts claims under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (J.A. 26),[2] alleging, on information and belief, that OCFS and the other named defendants "have illegally coerced a monopoly control over crisis intervention, behavior management

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1. HWC asserts in its petition, without any support, that PFAs absorb the cost of training through budget reductions (Pet. at 8), but that is not alleged in the complaint. To the contrary, the complaint alleges that the State pays for the training services (J.A. 31, 40).

2. Section 1 of the Sherman Act makes unlawful "[e]very contract, combination, in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States." Section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

and restraint training services to private child care providers" in New York (J.A. 40). The complaint further alleges, on information and belief, that all named defendants "knew, participated in, acquiesced, benefited from or accepted the plan" by which TCI was given this "exclusive monopoly" (J.A. 41). HWC alleges it has suffered injury because defendants' conduct affects its "ability to fairly compete for national and international training contracts" for crisis intervention and use of restraints (J.A. 41).

3. By memorandum decision and order dated September 29, 2005 (Pet. App. 1a-26a), the district court dismissed the complaint in its entirety.[3] The district court declined to reach defendants' argument that the antitrust claims, by challenging OCFS's regulatory actions, were barred by state-action immunity (Pet. App. 15a-20a). The court instead ruled that the claims failed because the complaint failed to support an inference that OCFS possessed power in the market for restraint services as a whole, and thus OCFS's alleged exclusive use of TCI to provide training services to PFAs could not possibly harm competition in the relevant market (Pet. App. 20a-24a).

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3. While the petition does not involve these claims, the complaint also asserts state-law claims and a federal copyright claim based on separate allegations that OCFS and its predecessor agencies unlawfully used copyrighted training materials owned by HWC's principal. In addition to dismissing the antitrust claims, the district court dismissed the copyright claim with prejudice and declined to exercise supplemental jurisdiction over the state-law claims (*see* Pet. App. 11a-13a, 25a). The Second Circuit reversed the dismissal of the copyright claim and remanded that claim to the district court for further proceedings (*see* Pet. App. 34a-37a, 39a).

The trial court first rejected plaintiff's argument that the complaint stated a per se violation of the Sherman Act (Pet. App. 21a-22a). The court concluded that plaintiff's allegations that OCFS would authorize and reimburse PFAs for TCI alone "amount to a claim of illegal exclusive contracting, which is not a per se violation because [exclusive dealing] arrangements are frequently found to benefit competition" (Pet. App. 22a).

Applying a Rule of Reason analysis, the district court held that the complaint improperly restricted the relevant product and geographic markets to the provision of "training services to New York State child care providers" licensed by OCFS (Pet. App. 22a [quoting J.A. 40, 41]). The court observed that the restraint techniques at issue did not apply only to children and therefore the relevant market was not limited to those "child care providers that require OCFS approval" (Pet. App. 24a). The district court held that the relevant market was properly defined as "the restraint services market as a whole" – including child care providers, social service agencies, law enforcement agencies, correctional facilities, educational institutions, and even airlines, all of which could benefit from knowledge of use-of-force techniques (Pet. App. 23a). According to the district court, "[a]ny anticompetitive effect resulting from allegedly biased purchasing decisions in the market must reflect the total demand for restraint services as a whole, not just OCFS's demand" (Pet. App. 22-23a). The court dismissed the complaint because it did not "provide[] a sufficient factual predicate to support an inference that OCFS enjoys any substantial market power in the broader market for restraint services" (Pet. App. 24a).

The district court also held that the complaint's "pleading of a geographic market" was insufficient (Pet. App. 24a). While HWC sought to restrict the focus to New York State alone, the court noted that HWC's own complaint showed that both HWC and Cornell marketed their training services far more broadly – alleging, for example, that the relevant customer base was "national consumers of training services" and that HWC "compete[d] for national and international training contracts" (Pet. App. 24a). It was unclear how OCFS's regulatory power in New York could affect the national or international market for restraint training contracts.

4. The court of appeals affirmed the dismissal of the antitrust claims, holding that the complaint failed to specify a relevant market and show market power sufficient to support an antitrust monopoly claim (Pet. App. 37a-39a). The appeals court agreed with the district court that HWC had not justified limiting the relevant market to New York child-care providers that require OCFS approval for their restraint policies, and had not pleaded facts creating a reasonable inference that OCFS possessed power in the broader market for restraint services (Pet. App. 39a). The court of appeals held that HWC "failed to show how the market for restraint training services *to child care providers* is any different from the larger market for restraint training services to other businesses, agencies, and organizations" (Pet. App. 38a). The appeals court further noted that plaintiff did not "contest that Handle With Care is marketed to and utilized by various organizations, institutions, and agencies that are not child care providers" and "readily admit[ted] in their complaint that they compete for such contracts on a

'national and international' basis" (Pet. App. 38a). The Second Circuit also found that it would be futile to give HWC an opportunity to replead because it had "offer[ed] no plausible argument as to how the failure to plead a relevant market could be rectified through an amended complaint" (Pet. App. 39a n.3).

REASONS FOR DENYING THE PETITION

Throughout this litigation, plaintiff has shifted its theory of antitrust liability in search of one that can survive dismissal. Its petition to this Court is no exception. The focus of plaintiff's complaint is its allegation that OCFS granted Cornell an unlawful monopoly actionable under § 2 of the Sherman Act. The petition raises no issue concerning § 2 liability, however. In the court of appeals, HWC argued mainly that its claims under § 1 should survive because the complaint properly defined a relevant market (the market for training OCFS-licensed New York child-care providers) and alleged OCFS's power within that market. But the petition does not raise those arguments either.

Now that the court of appeals has correctly rejected those arguments, HWC changes course once again. Its petition for certiorari raises a single question that it did not timely present to the court of appeals: whether detailed market analysis is unnecessary under § 1 where a complaint sufficiently alleges direct anticompetitive effects. The petition should be denied, first and foremost, because HWC did not preserve that question, the Second Circuit therefore did not purport to decide it, and plaintiff's complaint does not plausibly allege direct anticompetitive effects in any event.

Moreover, contrary to HWC's arguments, no circuit split exists on the question whether detailed market analysis is unnecessary where a complaint sufficiently pleads direct anticompetitive effects: all of the courts of appeals to have addressed the question, including the Second Circuit, have held that it is. Finally, even if the petition presented a certworthy question regarding the role of market analysis in Rule of Reason cases, and it does not, the question would not be reached on review here because HWC's claims are barred at the threshold by the doctrine of state-action antitrust immunity.

I. HWC Failed to Preserve the Issue Presented in the Petition, An Issue that Would Not Have Saved Its Complaint from Dismissal.

HWC did not timely present in the courts below the issue whether detailed market analysis is unnecessary in this case because the complaint purportedly pleads direct anticompetitive effects. Indeed, its briefing below implicitly conceded that the complaint had to allege a relevant market and allege that defendants possessed power in that market. HWC argued that the relevant market was the market in restraint training services for OCFS-licensed child care providers, and contended that the complaint sufficiently alleged that OCFS, as the licensing authority, possessed power within that market. *See* Pls.' Consolidated Br. Opposing Defs.' Mot. to Dismiss at 12-14, *Chapman v. N.Y. State Div. of Youth*, No. 1:04-cv-0867 (DNH/RFT) (N.D.N.Y., filed Dec. 29, 2004); Br. for Plaintiffs-Appellants at 24-39, *Chapman v. N.Y. State Div. of Youth*, No. 05-7010-cv (2d Cir., filed July 10, 2006); Reply Br. for Plaintiffs-Appellants at 32-41, *Chapman v. N.Y. State Div. of Youth*, No. 05-7010-

cv (2d Cir., filed Oct. 6, 2006).[4] HWC did not timely argue that detailed market analysis was unnecessary to sustain the complaint; it raised that argument for the first time in its petition for rehearing in the court of appeals.

Because HWC did not timely raise the question as to which it now seeks certiorari, the court of appeals' decision does not address the issue. The court of appeals did not hold, as petitioner claims, that detailed market analysis is necessary in every § 1 Rule of Reason case – or even that it is necessary in this case, because HWC effectively conceded that its complaint was required to specify the relevant market. The court of appeals merely rejected HWC's argument that the market was properly defined as the market for training OCFS-licensed New York child-care providers. After determining that the relevant market was the nationwide market for restraint training services as a whole, the court of appeals concluded that HWC had not alleged that OCFS possesses any power in that market with which it could impose anticompetitive conditions. (*See* Pet. App. 39a)

If HWC had timely argued that elaborate market analysis was unnecessary to its § 1 claim, the argument would not have saved its complaint from dismissal. While this Court and many others have held that detailed market analysis is unnecessary when a complaint challenging a horizontal agreement among competitors

4. In the lower courts, HWC also asserted in passing that the complaint could be read to allege a per se § 1 violation, but it offered no argument in that regard. Pls.' Consolidated Br. at 14; Br. for Plaintiffs-Appellants at 36. In its petition to this Court, it expressly limits the question presented to a Rule of Reason claim under § 1 and raises no issue about per se liability.

(which are more suspect than vertical agreements) pleads direct anticompetitive effects,[5] this case does not involve any horizontal restraint. Rather, as the district court recognized (Pet. App. 23a), HWC essentially alleges that OCFS has an exclusive dealing relationship with Cornell to provide training services to PFAs. The complaint asserts that OCFS, which approves PFAs' restraint policies and pays their training costs, will approve only the use of TCI (J.A. 31-32, 39-40).[6]

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5. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1985) (elaborate market analysis not required where all major market competitors agree to "a naked restraint on price and output"); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461-62 (1986) (detailed market analysis not necessary where an overwhelming majority of competing firms in localized markets engage in "[a] concerted and effective effort to withhold . . . information desired by consumers for the purpose of determining whether a particular purchase is cost-justified"); *Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001) (§ 1 claims alleging a horizontal agreement to exchange salary information survive dismissal where the complaint "specifically alleges that salary levels across the integrated oil and petrochemical industry have been artificially depressed because the information exchange has reduced competitive incentives").

6. The complaint thus fails to plead a plausible § 1 violation because it includes no facts that would support an inference that any conspiracy to restrain trade existed. The complaint's conclusory allegations that OCFS, Cornell, and others conspired to restrain trade are not sufficient. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("a naked assertion of conspiracy in a § 1 complaint" does not suffice). Apart from those conclusory allegations, the complaint alleges only unilateral action taken by OCFS alone, which cannot constitute a violation of § 1. *Fisher v. Berkeley*, 475 U.S. 260, 267 (1986).

Exclusive dealing arrangements are not disfavored, and they violate the antitrust laws only when they "foreclose competition in a substantial share of the line of commerce at issue," such that "opportunities for other [suppliers] to enter into or remain in that market [are] significantly limited." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 328 (1961). Under this test, a plaintiff challenging an exclusive dealing arrangement must present at least a rough market analysis; to show that competition has been foreclosed in a substantial share of the relevant market, the plaintiff must at least identify that market. *Id.* at 327 ("the threatened foreclosure of competition must be in relation to the market affected"); *see also* IIB Philip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 531e (3d ed. 2007) ("market definition is required" to assess whether vertical restraints such as exclusive dealing arrangements "foreclose actual or potential rivals from needed access to customers or suppliers").

Therefore, given the particular type of anticompetitive restraint HWC challenges here, at least some understanding of the relevant market was required. The court of appeals' holding that the relevant market is the national market for restraint services as a whole, which is unchallenged in the petition, would doom any showing of significant foreclosure under *Tampa Electric*. HWC does not allege that OCFS occupies a significant share of the national market for restraint services, nor is it plausible that this is so.

In addition to its failure to allege significant foreclosure in the relevant market, the complaint

contains no plausible allegation of direct anticompetitive effects. HWC focuses on the allegation that "TCI is currently charging New York State 4-10 times the rate that it charges for identical services provided to out-of-state customers" (J.A. 40). But that allegation, assuming it is true, means only that OCFS is overpaying for restraint training contracts. The antitrust laws require harm to competition as a whole; that one buyer may pay too much in a small segment of the overall market, while perhaps imprudent, does not evidence harm to competition.

II. There Is No Relevant Circuit Split.

The petition (at 19-27) incorrectly argues that there is a circuit split "as to whether a plaintiff who pleads or shows actual detrimental effects from antitrust misconduct is relieved from the burden of also specifically defining a market in order to assess a defendant's market power." As HWC points out (Pet. at 12-17), this Court has held on multiple occasions that the fullest market analysis is not required in every § 1 case. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) (not all § 1 cases under the Rule of Reason require "plenary market examination"); *Ind. Fed'n of Dentists*, 476 U.S. at 461 ("finding of actual, sustained adverse effects on competition" in particular localized markets is sufficient "even in the absence of elaborate market analysis"); *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 109 (a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis"). Unsurprisingly, every court of appeals to address the issue has followed these holdings and held that a § 1 plaintiff may dispense with

detailed market analysis where it establishes direct anticompetitive effects.

Indeed, contrary to HWC's claims, the Second Circuit has never held that detailed market analysis is required in every § 1 Rule of Reason case; it has repeatedly recognized that such claims may be proved by showing direct anticompetitive effects. The petition therefore asks this Court to grant certiorari to correct a supposed error of law that the Second Circuit has never made – in this case or any other.

The court of appeals' leading decision on the point, *Capital Imaging Associates v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537 (2d Cir. 1993), observes that market power (which is often shown through detailed market analysis) is not "the *sine qua non* of antitrust liability," although it is typically a "highly relevant factor" given its "particularly strong relationship to a party's ability to injure competition." 996 F.2d at 546. *Capital Imaging* further recognizes that a plaintiff may proceed under the Rule of Reason "without 'detailed market analysis' by offering 'proof of actual detrimental effects, such as a reduction in output.'" *Id.* (quoting *Ind. Fed'n of Dentists*, 476 U.S. at 460-61).

The Second Circuit has reiterated this view many times, most recently in *Geneva Pharmaceuticals Technology Corp. v. Barr Labs., Inc.*, 386 F.3d 485 (2d Cir. 2004). There, the court stated: "We have not required proof of market power in § 1 cases. If plaintiff can demonstrate an actual adverse effect on competition, such as reduced output, there is no need to show market

power in addition." 386 F.3d at 509 (citations omitted); *see also Todd*, 275 F.3d at 206 (noting that "a threshold showing of market share is not a prerequisite for bringing a § 1 claim," and holding that the complaint sufficiently alleged direct anticompetitive effects to survive a motion to dismiss); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) ("This court has not made a showing of market power a prerequisite for recovery in all § 1 cases.").

HWC (Pet. at 25) contends that the Second Circuit has turned its back on *Capital Imaging* and its progeny in favor of "a very strict test" of § 1 liability requiring detailed market analysis in every Rule of Reason case. It is mistaken. *Capital Imaging* remains good law; it has not been overruled or even criticized by the Second Circuit.[7] As supposed support for its contrary position, HWC points to language from recent Second Circuit decisions stating that an antitrust plaintiff "bears the initial burden of showing that the challenged action has an actual adverse effect on competition as a whole in the relevant market." Pet. 25 (quoting several cases). But that language, which comes from *Capital Imaging* itself, does not imply that a detailed market analysis is required in every § 1 case. The reference to "competition

7. HWC (Pet. at 24) also argues that in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), the court "ducked" the question whether a showing of market power is always required. But in *Visa U.S.A.*, as in this case, no party disputed that market analysis was appropriate, and the court ultimately affirmed the district court's finding that defendants possessed power in the relevant market. *Id.* at 238. Indeed, the court acknowledged in a footnote that authorities suggested that a showing of market power is not always necessary. *Id.* at 238 n.4

as a whole in the relevant market" merely emphasizes that a plaintiff must show harm to competition, not to any particular competitor. As the Second Circuit explained in *Capital Imaging*:

> [P]laintiff bears the initial burden of proving that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors.

996 F.2d at 543. The passage does not suggest that elaborate market analysis is the only way to establish harm to competition as a whole, and the decision elsewhere expressly holds that a § 1 claim may be established by showing direct anticompetitive effects.

Nor does HWC identify any other court of appeals that requires detailed market analysis where a § 1 plaintiff shows direct anticompetitive effects. The petition acknowledges that the Fifth, Sixth,[8] Eighth,

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8. The petition observes that the Sixth Circuit held in *Nilavar v. Mercy Health System-Western Ohio*, 244 Fed. Appx. 690, 695 (6th Cir. 2007), that significant evidence of competitive harm may obviate the need for the plaintiff to define a geographic market and show market power. Pet. at 19. But petitioner (Pet. at 21) also notes that an earlier decision from the Sixth Circuit, *Worldwide Basketball & Sport Tours v. NCAA*, (Cont'd)

Ninth, and Eleventh[9] Circuits correctly do not do so. Pet. at 19-20. Although HWC does not discuss the District of Columbia Circuit, that court follows the same rule. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005) (a plaintiff need not always offer "elaborate market analysis" to sustain a § 1 Rule of Reason claim).

HWC suggests that the Seventh Circuit is on the "minority" side of the purported "split," but it is not. The Seventh Circuit has squarely held that a §1 plaintiff may prove a claim under the Rule of Reason either of two ways: (1) by offering "direct evidence of anticompetitive effects," or (2) more commonly, by proving "relevant product and geographic markets and . . . showing that the defendant's share [of that market] exceeds whatever threshold is important for the practice in [question]." *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000). That is the same rule HWC advocates in its petition.

While ignoring *Toys "R" Us*, HWC (Pet. at 21) criticizes a more recent case from the Seventh Circuit,

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(Cont'd)

388 F.3d 955, 960-61 (6th Cir. 2004), appears to excuse detailed market analysis only in a somewhat narrower class of cases. To the extent any tension may exist between these two decisions around the margins of the issue, the Sixth Circuit should be permitted an opportunity to resolve that tension on its own, particularly given the consistency in other circuits' views.

9. The petition's reference (at 22) to a supposed special rule adopted by the Eleventh Circuit for patent cases is not relevant here, because this is not a patent case.

Republic Tobacco Co. v. North Atlantic Trading Co., 381 F.3d 717 (7th Cir. 2004). That case, however, actually acknowledges that certain § 1 claims may be proved by "direct evidence of anticompetitive effects," and further allows that, while past claims proved through direct evidence involved horizontal restraints, it may also be possible to prove an appropriate vertical-restraint claim through "direct anticompetitive effects analysis." *Id.* at 737.

The Seventh Circuit nevertheless held in *Republic Tobacco* that the particular plaintiff before it had failed to show by direct evidence that the challenged exclusive dealing contract had anticompetitive effects, because the plaintiff's argument was predicated on the existence of a southeast regional market in the relevant product, when the market was in fact national in scope. *Id.* In reaching that holding, the court noted that a § 1 plaintiff "may not dispense entirely with market definition." *Id.* HWC seizes on that statement (Pet. at 21), but it does not create any tension among the courts of appeals. It merely expresses the common-sense idea that even assessment of direct anticompetitive effects requires a general understanding of the relevant market, if not precise market definition and quantitative assessment of market share. As the court put it, "[e]conomic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." *Id.*

This Court's precedents say nothing different. The Court has been careful to state that "elaborate," "detailed," or "plenary" market analysis may be excused in certain cases; it has never suggested that direct-

effects analysis can proceed without at least some sense of the relevant market. Indeed, in the principal case cited by HWC, *Indiana Federation of Dentists*, the Court's direct-effects analysis was predicated on the understanding that the relevant markets "tend[ed] to be relatively localized" and that "heavy majorities" of the firms in particular localities had engaged in the alleged horizontal restraint. 476 U.S. at 460-61. Ultimately, even HWC does not seriously dispute that some rough understanding of the relevant market is required, arguing only that a plaintiff need not "specifically" or "precisely" define the market where direct anticompetitive effects are sufficiently shown (Pet. at 19, 23), a proposition that *Republic Tobacco* expressly recognizes.

III. The Question Presented Would Not be Reached On Review Here Because HWC's Claims Are Barred by State-Action Immunity.

In addition, this Court's review would be unwarranted because, regardless of the Court's position on the question presented in the petition, HWC's claims are barred under the threshold doctrine of state-action immunity. *See generally Parker v. Brown*, 317 U.S. 341 (1943).

While both lower courts declined to decide the question of state-action immunity, the doctrine plainly precludes HWC's claims. It is settled that the Sherman Act does not apply to anticompetitive restraints imposed by the States "as an act of government." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S.

365, 370 (1991) (quoting *Parker*, 317 U.S. at 352)). *See generally* IA Areeda, supra, §§ 221-231. By alleging that OCFS has imposed a restraint on trade through its regulatory power to approve PFAs' restraint policies, the complaint alleges a restraint imposed by the State itself.

To be sure, this Court has thus far recognized only state legislatures and highest courts as representing the sovereign State for the purpose of *Parker* immunity, and it has expressly reserved the question whether a State's executive branch enjoys similar status. *See Hoover v. Ronwin*, 466 U.S. 558, 568 n.17 (1984). Nonetheless, the circuit courts have generally viewed state executive branch agencies as the State itself where the agencies are politically accountable to the State and thus not beholden to special business interests. *See Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28-29 (1st Cir.) (state university), *cert. denied*, 528 U.S. 1061 (1999); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 875-76 (9th Cir. 1987) (state department of transportation); *Green v. State Bar*, 27 F.3d 1083, 1087 (5th Cir. 1994) (counsel for state committee on unauthorized practice of law, created by state statute, a state agency entitled to *Parker* immunity). *See also* IA Areeda, supra, § 224b (designation as "state itself" appropriate for those governmental agencies that are both statewide in their jurisdiction and have no particular susceptibility to capture by a particular business group).

Like the agencies involved in these cases, OCFS is a state executive agency that undertakes state functions

and is politically accountable to the State. OCFS possesses statewide jurisdiction and is headed by a commissioner who is appointed by the Governor, on advice and consent of the New York State Senate, and thereafter serves at the Governor's pleasure. N.Y. Exec. Law § 500(1). The agency was created to supervise, among other things, foster care, child protective services, and day care for children, all issues of statewide importance. It operates pursuant to statewide regulations that its commissioner is expressly empowered to promulgate. *See* N.Y. Soc. Serv. Law §§ 20(3)(d), 34(3)(f). Its actions are the actions of the State for the purpose of *Parker* immunity.

But even if OCFS could be viewed as something less than the State itself, and more akin to a state political subdivision, immunity would attach. This Court has held that local governments and other political subdivisions, although not themselves sovereign, enjoy immunity when they act pursuant to a "clear[ly] articulat[ed]" state policy to supplant competition. *Omni Outdoor Advertising*, 499 U.S. at 372. This test does not require "specific, detailed legislative authorization" for the alleged anticompetitive conduct. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality op.). Rather, immunity applies if the subdivision's anticompetitive conduct is a "foreseeable result" of authority delegated to it. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985).[10]

10. By contrast, the anticompetitive acts of private parties are protected by state-action immunity only where the "clear articulation" standard is satisfied and the State itself actively supervises the private parties' actions. *Cal. Retail Liquor*

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This standard of foreseeability is satisfied here. New York's Legislature expressly vested OCFS with authority to regulate voluntary authorized agencies and to license the residential child-care facilities that such agencies operate. *See* N.Y. Soc. Serv. Law §§ 375–378, 460-b, 460-c, 462; *see also* Welfare Reform Act, ch. 436, pt. B, § 122, 1997 N.Y. Laws 2806, 2869, 2922. The Legislature directed OCFS's commissioner "to promulgate regulations concerning standards of care and treatment . . . which shall apply to all facilities exercising care or custody of children." N.Y. Soc. Serv. Law § 462(1)(a). Moreover, the Legislature specifically required OCFS to establish as a priority that child-care workers receive training in safety and security procedures and techniques in child management, including crisis intervention. *Id.* § 462(1)(c). Even if the Legislature may not have had the precise nature of OCFS's alleged arrangement with Cornell in mind, it was foreseeable that OCFS would provide residential

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Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980). The "active supervision" requirement does not apply to restraints imposed by political subdivisions. *Town of Hallie*, 471 U.S. at 46-47.

Here, although the complaint names Cornell as a defendant, it does not allege that Cornell itself imposed any restraint on trade, essentially asserting only that Cornell accepted the State's invitation to be its exclusive supplier. Thus, if the State's exclusive use of Cornell's services is immune from antitrust liability, Cornell cannot be subject to antitrust liability either. *See* IA Areeda, supra, § 227a ("Where private parties act together with state agencies or officials, it is necessary to determine who 'caused' or 'imposed' the relevant restraint. If the state itself has done so, there is no antitrust liability.").

child-care facilities with the necessary training through a chosen provider – in this case, an educational institution eligible for federal grant funding.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREA OSER
Deputy Solicitor General
RICHARD DEARING
Assistant Solicitor General
120 Broadway
New York, New York 10271
(212) 416-8016

Attorneys for the
New York State Respondents

* *Counsel of Record*